Re Baring Futures (Singapore) Pte Ltd (in compulsory liquidation) and another action
[2002] SGHC 15

Case Number	: CWU 246/1995, NM 600141/2001, 600142/2001: OS 601723/2001, SIC 602847/2001
Decision Date	: 28 January 2002
Tribunal/Court	: High Court
Coram	: Lai Kew Chai J
Counsel Name(s)	: VK Rajah SC, Chong Yee Leong and Deanna Seow (Rajah & Tann) for the liquidators of BFS and applicants of SIC 602847/2001 in OS 601723/2001; Haridass Ajaib and Randhir Chandra (Haridass Ho & Partners) for the applicants in NM 600141 and 600142/2001 in CWU 246/95
Parties	: —

Companies – Schemes of arrangement – Approval by court – Indemnity costs claims of auditors – Liquidators rejecting auditors' proofs of debt – Application for order reversing liquidators rejection of proofs of debt and admitting them in full – Exercise of court's discretion to defer determination of claims until certain events occur – ss 172 & 210 Companies Act (Cap 50, 1994 Ed)

or where a final non-appealable judgment on D&T Singapore’s liability had been entered; secondly, actual liability of BFS to D&T Singapore in respect of the costs of the BFS action had been finally determined; and thirdly, the costs escrow account of 26 million pounds had been exhausted and proven insufficient to meet the actual costs claims of D&T Singapore. In the circumstances of the case, the court felt uncomfortable granting reliefs where there were a number of contingencies and where the taxed costs may be significantly below the funding already in place (see 12 – 15).

Cases referred to

In re Pacific Coast Syndicate, Ltd [1913] 2 Ch 26 (refd)
Norglen v Reeds Raines Prudential [1999] 2 AC 1 (refd)
Re Atlantic Computer Systems plc [1992] Ch 505 (refd)
Rowland & Ors v Gulfpac Limited [1999] Lloyd’s Rep Bank 86 (refd)

Legislation referred to

Companies Act (Cap 50) ss 172, 210

Judgment

GROUNDS OF DECISION

On 20 November 2001 I granted leave to the Liquidators ("BFS Liquidators") of Baring Futures (Singapore) Pte Limited (in Liquidation) ("BFS") to convene a creditors’ meeting to agree, with or without modification, a scheme of arrangement as detailed in the document described as "Proposals in Relation to A Scheme of Arrangement Under Section 210 of the Companies Act (Cap 50)" which is hereinafter referred to as "the Singapore Scheme". This was one of the predecessor steps which the BFS Liquidators, as required, had taken as they intended to make as soon as practicable interim dividend payments to certain creditors of BFS after having satisfied themselves that they had in place the provisions of funding (which I shall in a moment describe in greater detail) sufficient to pay for and, in addition, meet any adverse costs orders, whether on the standard or indemnity basis, which may be incurred by or made against BFS in its trimmed down action ("Auditors action") against Deloitte & Touche Singapore ("D&T Singapore"). The Auditors action is shortly to continue before

Justice Evans-Lombe in London, UK. It was envisaged that if the proposed Singapore Scheme was approved in all material respects at the creditors' meeting I would resume hearing on the eve of the New Legal Year 2002 to sanction the Singapore Scheme.

2 A meeting of creditors of BFS was duly convened on 6 December 2001. A representative of D&T Singapore attended the meeting. He informed the chairman and those present that D&T intended to appeal against the BFS Liquidators' rejection of D&T Singapore's indemnity costs claim as well as their contribution claims against BFS which they had asserted against BFS in the Auditors action. The extent of the indemnity costs of D&T was stated to be S$42,459,135.57. The amount was the value which was attributed to D&T Singapore's vote. D&T Singapore's contribution claim was regarded as not a provable debt in liquidation because BFS's contribution claim, an unliquidated claim in tort, was not specified in D&T Singapore's first Proof of Debt. However, there was an indication in the first Proof of Debt that the total debt due was approximately S$3.86 billion.

3 The Singapore Scheme was duly approved by a majority in number representing three-fourths in value of the creditors present and voting either in person or by proxy. D&T Singapore's proxy voted but on a without prejudice basis.

4 On 7 December 2001 D&T Singapore filed the second Proof of Debt. In an annexure to the prescribed Proof of Debt Form, they stated that they were appointed auditors of BFS in or about October 1986 and remained as auditors of BSF until about July 1994. In particular, they were the auditors of BFS's financial statements for the financial year ended 30 September 1992 and for the 15 month period ended 31 December 1993. They further asserted that, among other terms, under their appointment, the terms of which incorporated the Articles of Association of BFS, they are entitled to an indemnity out of the assets of BFS against all losses or liabilities which they may have incurred in the execution of the duties of their office as auditors.

5 Article 110 provides as follows:

> "Every Director or other officer of the Company shall be entitled to be indemnified out of the assets of the Company against all losses or liabilities (including any such liability as is mentioned in the Act), which he may sustain or incur in or about the execution of the duties of his office or otherwise in relation thereto, and no such Director or other officer shall be liable for any loss, damage or misfortune which may happen to or be incurred by the Company in the execution of the duties of his office or in relation thereto. But this Article shall only have effect in so far as its provisions are not avoided by the Act."

6 D&T Singapore submitted that any such contractual claim for costs will also be a claim in respect of which they are entitled to be paid in full, in priority to other creditors and in priority to costs and expenses incurred in the liquidation (other than those incurred in getting in, maintaining and realizing the assets). Alternatively, they claim priority as an expense of the liquidation in priority to other creditors.

7 As the BFS Liqudators joined issues with these submissions, I also had before me two motions filed under the winding up petition. Under one motion, D&T Singapore are seeking an order that the decisions of the BFS Liquidators in rejecting the two Proofs of Debts filed in November and December last year be reversed and the further order that they be admitted in full. As noted earlier, D&T Singapore relied on the contractual indemnity under Article 110 and they asserted that the liabilities they incurred were in respect of costs of defending proceedings brought by Baring PLC ("PLC") and Bishopscourt (BS) Limited ("BSL") in the High Court of England, Chancery Division and by the

Singapore Public Accountancy Board ("PAB"). D&T Singapore observed that judgment was given in their favour in both cases, although the BFS Liquidators contended that, in the absence of full disclosure of the PAB proceedings, it must be inferred that on the totality of the evidence there was evidence that the PAB had found D&T Singapore negligent, though not grossly negligent, which was probably the reason why they were found not guilty of any professional negligence.

8 I return to the Singapore Scheme for which sanction is sought from me. BFS Liquidators had also sued Coopers & Lybrand, Singapore for damages for negligence. That action was settled. The settlement arrived at by all interested parties contemplated making an interim distribution to the creditors of BFS, PLC and BSL mainly from the payment of 65 million by Coopers & Lybrand firms and from the existing assets of BFS, PLC and BSL. To continue to fund the litigation against D&T Singapore the creditors have agreed to put in place 2 escrow accounts from which monies can be drawn by BFS, PLC and BSL. They are described as the Litigation Escrow Account and the Costs Escrow Account.

9 For D&T Singapore, counsel postulated to me for consideration this scenario. If the trial judge in the Auditors action in London exercises his discretion to award D&T Singapore its costs against BFS on the standard basis, and on the assumption that Singapore courts finally determine that D&T Singapore as auditors are entitled to an indemnity under Article 110, counsel pointed out that the difference between the costs as awarded by the trial judge in the Auditors action and the full amount of costs they will have incurred would be "in excess of 5 million". I was told that this figure is based on the assumptions that standard basis costs will be recovered at the rate of 75% of the gross costs and that under the indemnity D&T Singapore will recover 90% of its gross costs.

10 It should be noted that there were canvassed before me conflicting submissions of both parties in relation to the contractual claim of D&T Singapore under Article 110. The BFS Liquidators adopted a root and branch counter-attack. They asserted, in the first place, that Article 110 was not even incorporated into the contract of engagement between D&T Singapore and BFS. Secondly, as a matter of strict construction, they contended that Article 110 did not entitle D&T Singapore to an indemnity in respect of its costs of the Auditors Action or the PAB proceedings. The principal submissions were (i) that those costs were not "losses or liabilities sustained or incurred in or about the execution of (their) duties to the company or otherwise in relation thereto"; and (ii) that it was on the evidence never intended by the parties that Article 110 would provide an indemnity for such costs. In support of the first named principal submission, they relied on the dicta of Rix J. (as he then was) in *Rowland & Ors v Gulfpac Limited* [1999] Lloyd's Rep. Bank 86, at 93col. 1 where he stated: "But costs incurred as an expense, …., or in England as part of the directors' own English proceedings, are costs incurred in defending or prosecuting actions and are not, it seems to me, costs incurred or sustained in or about the execution of a director's duties to Gulpac or otherwise in relation thereto." On the other hand, counsel for D&T Singapore, especially in their supplemental submissions, countered with some force that the words were clear and apt to confer an indemnity for D&T Singapore costs if they successfully defend against the claims for negligence, which is in line with the indemnity permitted under section 172(2) of the Companies Act.

11 In relation to the treatment of the contractual claim of D&T Singapore as a matter of priority in the distribution out of the assets of the company, counsel for D&T Singapore asserted that the contractual claim would fall within the principle of the estate costs rule as set out in *In re Pacific Coast Syndicate, Ltd* [1913] 2 Ch 26 which was recently followed without discussion by the House of Lords in *Norglen v Reeds Raines Prudential* [1999] 2 AC 1, per Lord Hoffmann at p.20. Alternatively, and in any event, they submitted that the contractual claim would rank as an expense of the liquidation. They pointed to the "critical feature" of the claim which was that the Auditors action was commenced by the BFS Liquidators after BFS was in liquidation. They relied on the reasoning of

Nicholls LJ (as he then was) in *Re Atlantic Computer Systems plc* [1992] Ch 505 at p 522 where he reasoned that in a case where a debt had been incurred for the benefit of the insolvent estate "it is just and equitable that the burden of the debt should be borne by those for whose benefit they insolvent estate is being administered."

12 For the reasons which follow shortly, I have decided in the exercise of my discretion to defer determination of the indemnity and the super-priority or, alternatively, the expense claims of D&T Singapore until three events have come to past: viz, (1) BFS's claims against D&T have been settled, or where a final non-appealable judgment on D&T Singapore's liability has been entered; (2) actual liability of BFS to D&T Singapore in respect of the costs of the BFS action has been finally determined; AND (3) the Costs Escrow Account of 26 million has been exhausted and proven insufficient to meet the actual costs claims (whether decided on a standard or indemnity basis) of D&T Singapore. In the circumstances of this case, I feel uncomfortable exercising my discretion and granting reliefs where there are a number of contingencies and where the taxed costs may be significantly below the funding already in place. The appeals of D&T Singapore against the rejection of their two Proofs of Debt are also in consequence deferred for determination until after the abovementioned issues in relation to the alleged indemnity has been made. They are inextricably intertwined.

13 The first of these reasons has to do with an analysis of the figures. The following conclusions seem to me justified. If the settlement is implemented, the amount of provision for D&T Singapore's costs is 26 million. As at 5 November 2001, D&T Singapore's alleged estimated costs until end of trial are approximately 28.5 million and interest. As of that date, they would have spent 22 million and they are incurring costs at the rate of 1 million a month. At this present burn rate, D&T Singapore will only hit 26 million at the end of February 2002. As of today, I am confident that until the end of February 2002 BFS still has sufficient cover to continue litigation against D&T Singapore.

14 The Vice-Chancellor Sir Andrew Morrit, Head of the Chancery Division of the Royal Courts of Justice had recently overruled D&T's objections and allowed interim distribution. The reason was, inter alia, the amount of costs claimed by D&T Singapore will probably be taxed down anyway. The Vice-Chancellor described the costs of the litigation estimated by D&T Singapore as of "quite astonishing size' and the London Liquidators of PLC and BSL had provided "compelling criticism of the amount of [D&T Singapore's] costs and strong reasons for believing that the amount claimed will not be recovered to anything like that extent on a detailed assessment.". I also respectfully adopt the other material reasons of the Vice-Chancellor.

15 I accordingly sanction the Singapore Scheme as approved by the requisite majority in value of the creditors. With the implementation of the settlement, the estate will be allowed to be capitalized so that the BFS Liquidators have access to the Costs and Litigation Escrow Accounts and can continue litigation until the point is reached where the liquidators are of the view that there would be insufficient funding to cover D&T Singapore's costs and therefore have to consider terminating the BFS action against D&T Singapore and paying them the inevitable costs award or when BFS gets further funding from its creditors before continuing the said action. Last but not least, and as the Vice-Chancellor had pointed out in his judgment, D&T Singapore have alternative routes to secure or provide for its costs even if the scheme is approved. I have no reason to doubt that such alternative routes are available if the costs estimates of D&T Singapore are shown to be meritorious in London.

16 Near the end of the hearing on 7 January 2002, counsel for the BFS Liquidators informed of the matters set out in the submissions and applied pursuant to section 272(1)(d) of the Companies Act for sanction of the 7 netting off Deeds on contribution liability and costs incurred in relation to the contributing proceedings. I have considered the draft order which I now approve. Counsel for both

parties are directed to settle the draft orders in accordance with my rulings herein and submit them to me for approval as soon as practicable.

Sgd:

Lai Kew Chai
Judge

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